

April 13, 2006

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-09 is available for public comments under this procedure. It was requested by, Russell Smith., on behalf of The American Institute for Certified Public Accountants and The American Institute for Certified Public Accountants Political Action Committee.

Proposed Advisory Opinion 2006-09 is scheduled to be on the Commission's agenda for its public meeting of Thursday, April 20, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on April 19, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-09, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 13, 2006

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Anthony T. Buckley
Attorney

Subject: Draft AO 2006-09

Attached are two proposed drafts of Advisory Opinion 2006-09, which responds to the request from the American Institute of Certified Public Accountants ("AICPA") and its separate segregated fund, the American Institute of Certified Public Accountants Political Action Committee ("AICPA PAC"). The requestors seek the Commission's determination as to whether AICPA PAC must attribute checks from partnerships that represent contributions from individual partners as contributions from individual partners and as contributions from the partnerships.

Draft A concludes that AICPA PAC must attribute such contributions to both the individual partners and to the partnerships. Draft B concludes that AICPA PAC may be able to attribute the contribution to individual partners only.

We request that these drafts be placed on the agenda for April 20, 2006.

Attachment
Drafts A and B

1 ADVISORY OPINION 2006-9

2
3 Mr. Russell L. Smith
4 Willkie Farr & Gallagher, LLP
5 1875 K Street, NW
6 Washington, DC 20006-1238
7
8

DRAFT A

9 Dear Mr. Smith:

10 We are responding to your advisory opinion request on behalf of the American
11 Institute of Certified Public Accountants (“AICPA”) and its separate segregated fund, the
12 American Institute of Certified Public Accountants Political Action Committee (“AICPA
13 PAC”), concerning the application of the Federal Election Campaign Act of 1971, as
14 amended (the “Act”), and Commission regulations to AICPA PAC’s treatment of checks
15 received from partnerships. The Commission concludes that AICPA PAC must attribute
16 and report any check received from a partnership as a contribution by the partnership, as
17 well as contributions by individual partners.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 February 16, 2006.

21 AICPA, a District of Columbia nonprofit corporation, is the national professional
22 organization composed of Certified Public Accountants, many of whom practice their
23 profession as partners in professional partnerships. The partnerships themselves do not
24 belong to AICPA. AICPA PAC is AICPA’s separate segregated fund (“SSF”), and is
25 registered with the Commission.

26 Some partnerships deduct partners’ dues to AICPA from their partnership
27 compensation and aggregate all of the dues payments into a single check transmitted to

AICPA. AICPA PAC would like to accept contributions from partners in a similar manner. Under the proposal, partners would have their partnerships deduct their individual contributions from their respective compensation. A partnership would then aggregate these individual contributions into one check drawn on the partnership's operating account, which the partnership would then send to AICPA PAC.

Question Presented

May AICPA PAC accept a check representing contributions by individual partners of a partnership and attribute the contributions to the individual partners only and not also attribute the contribution to the partnership, and report the contributions as such?

Legal Analysis and Conclusions

The Commission concludes that AICPA PAC may accept a check from a partnership representing contributions by individual partners and that it must attribute the contributions to both the individual partners and the partnership. AICPA PAC must report the contributions accordingly.

Under the Act and Commission regulations, a partnership is a "person." 2 U.S.C. 431(11); 11 CFR 100.10. As a result, a contribution from a partnership is attributable not only to individual partners but also to the partnership itself. *See* 11 CFR 110.1(e). The Commission considered and rejected attributing partnership contributions only to individual partners, concluding that this would be in conflict with the Act. *See* Explanation and Justification, Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Committees, 52 FR 760, 764 (Jan. 9, 1987).

1 You offer three rationales for why you believe the Commission should allow
2 AICPA PAC to attribute the contributions to the individual partners only and not also to
3 the partnership, which are addressed in turn.

4 1. Contributions Drawn on a Partnership's Operating Account

5 In one instance, the Commission allowed a partnership to forward contributions
6 from partners to the partnership's nonconnected political committee without the amounts
7 of the partners' contributions being considered partnership contributions. *See* Advisory
8 Opinion 2005-20 (Pillsbury Winthrop). However, the special circumstances that existed
9 in that advisory opinion do not exist in the proposed scenario you present on behalf of
10 AICPA and AICPA PAC for two reasons.

11 In Advisory Opinion 2005-20 (Pillsbury Winthrop), a partnership that was a
12 Federal contractor sought to use its automated electronic payroll system to disburse funds
13 from the partnership's payroll account to the partnership-sponsored nonconnected
14 political committee. The payroll account held only undistributed income of the partners
15 and was segregated from the partnership's operating account. Partners determined how
16 their net compensation contained in the payroll account was to be disbursed. Based on a
17 number of factors concerning the control individual partners had over funds in the payroll
18 account, and the lack of any control the partnership had over an individual partner's
19 choice of recipients of those funds, the Commission determined that at the moment the
20 funds were disbursed from the payroll account, they were the personal assets of the
21 individual partners.¹

¹ However, the Commission also determined that the nonconnected political committee had to pay the partnership for costs related to the use of the automated electronic payroll system in advance so as to avoid accepting an illegal contribution from a Federal contractor, *i.e.* the partnership itself.

1 The first distinction between Advisory Opinion 2005-20 (Pillsbury Winthrop) and
2 your proposed activity concerns the accounts from which the contributions would be
3 drawn. Unlike the situation in the Advisory Opinion, the contribution checks to AICPA
4 PAC would be drawn on the partnerships' operating accounts rather than accounts
5 containing undistributed income of the partners. The funds in the partnership operating
6 accounts would be under the control of the partnerships themselves, and not subject to the
7 control of the individual contributing partners. The funds in operating accounts have not
8 been designated as partner compensation. In effect, the partnership would contribute to
9 AICPA PAC an advance of a partner's compensation that would be reimbursed later in a
10 separate transaction when the partner's compensation is reduced. *See* Advisory Opinion
11 2005-20 (Pillsbury Winthrop), n. 3. As a result, any contribution checks drawn on a
12 partnership's operating account would constitute a contribution by both the partnership
13 and the individual partners and must be reported as such. *See also* Advisory Opinion
14 1984-10 (Arnold & Porter) (where a plan to enable partners to make individual
15 contributions that would be made by checks drawn on the partnership's operating account
16 was found unlawful because the contributions would also be attributable to the
17 partnership, that was a Federal contractor).

18 The second distinction between Advisory Opinion 2005-20 (Pillsbury Winthrop)
19 and your proposed activity concerns the relationship between the partnership disbursing
20 the funds and the recipient committee. In Advisory Opinion 2005-20 (Pillsbury
21 Winthrop), the partnership sponsored the nonconnected committee receiving the
22 contributions. Here, in contrast, the partnerships are not even members of AICPA, and
23 do not have similar ties to AICPA PAC.

1 2. Collecting Agents and Conduits

2 You assert that if the partnerships were to collect and transmit contributions to
3 AICPA PAC, “the partnerships would be involved in . . . relationship[s] with . . . AICPA
4 that [are] analogous to those described” in the collecting agent rules at 11 CFR
5 102.6(b)(1). A collecting agent is “an organization or committee that collects and
6 transmits contributions to one or more separate segregated funds to which the collecting
7 agent is related.” *Id.* Thus, the regulations regarding collecting agents are based on a
8 relationship existing between the collecting agent and the SSF. *See* 11 CFR
9 102.6(b)(1)(i)-(iv). Here, the partnerships are not members of AICPA, and have no
10 relationship with AICPA PAC. Accordingly, the partnerships would not be collecting
11 agents for AICPA PAC. Indeed, even if the partnerships were members of AICPA, the
12 partnerships could not be collecting agents for AICPA PAC. *See* Advisory Opinion
13 1997-9 (Chicago Board of Trade) (the member firms of a membership organization did
14 not qualify as collecting agents for the membership organization’s SSF).

15 The Commission also disagrees with your assertion that the partnership’s
16 activities here would be analogous to the actions of conduits or intermediaries. Conduits
17 and intermediaries collect and forward contributions to candidates and their authorized
18 committees, not to SSFs. *See* 2 U.S.C. 441a(a)(8); 11 CFR 110.6(b)(2). Because your
19 proposal involves a separate segregated fund receiving the contributions, the provisions
20 of the Act and Commission regulations regarding conduits and intermediaries do not
21 provide a basis for forwarding partners’ contributions without also attributing them to the
22 partnerships.

1 3. Payroll Deduction

2 You assert that recently adopted Commission regulations at 11 CFR 114.8(e)(3)
3 regarding the use of payroll deductions by corporations support your proposed activity.
4 Section 114.8(e)(3) permits a corporation to use payroll deductions to forward
5 contributions by its employees who are in the solicitable class to the SSF of a trade
6 association of which the corporation is a member. The policy rationale supporting these
7 regulations is to recognize “the special relationship that exists between a trade association
8 and its members corporations . . . [which] is firmly rooted in the Act.” Explanation and
9 Justification, Final Rules on Payroll Deductions by Member Corporations for
10 Contributions to a Trade Association’s Separate Segregated Fund, 70 FR 41939, 41941
11 (July 21, 2005).

12 Section 114.8(e) does not support your proposed activity for three reasons. First,
13 the plain language of section 114.8(e)(3) does not apply to the partnerships under your
14 proposal because they are not corporations and not members of AICPA. Moreover, the
15 partnerships do not have the “special relationship” with AICPA that underlies section
16 114.8(e)(3). Second, you suggest that revised section 114.8(e) would allow a corporation
17 to collect and forward contributions to a membership organization’s SSF from employees
18 who are members of the membership organization, and that, by implication, your
19 proposed activity should also be allowed. However, when the Commission adopted these
20 new rules, it declined to revise its regulations “to allow a corporation to provide
21 incidental services to collect and forward contributions to a membership organization’s
22 SSF from employees who are members of the membership organization.” *Id.*, 70 FR at
23 41943. Finally, the funds of corporate employees made available via payroll deduction

1 under section 114.8(e) differ in character from funds contained in partnership operating
2 accounts under your proposal. Payroll funds being disbursed according to employee
3 instructions are personal funds of the employee. The partnership operating accounts that
4 would be the source of the contributions under your proposal belong to the partnerships,
5 not the individual partners.

6 Based on the foregoing analysis, AICPA PAC must attribute and report any
7 contribution received from a partnership as a contribution from the partnership, as well as
8 from individual partners.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity.

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17 Sincerely,
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21 Michael E. Toner
22 Chairman
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25 Enclosures (Advisory Opinions 2005-20, 1997-9, and 1984-10)

1 ADVISORY OPINION 2006-9

2
3 Mr. Russell L. Smith
4 Willkie Farr & Gallagher, LLP
5 1875 K Street, NW
6 Washington, DC 20006-1238
7
8

DRAFT B

9 Dear Mr. Smith:

10 We are responding to your advisory opinion request on behalf of the American
11 Institute of Certified Public Accountants (“AICPA”) and its separate segregated fund, the
12 American Institute of Certified Public Accountants Political Action Committee (“AICPA
13 PAC”), concerning the application of the Federal Election Campaign Act of 1971, as
14 amended (the “Act”), and Commission regulations to AICPA PAC’s treatment of checks
15 received from partnerships. The Commission concludes that AICPA PAC may attribute
16 and report certain checks received from partnerships as contributions only by individual
17 partners.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 February 16, 2006.

21 AICPA, a District of Columbia nonprofit corporation, is the national professional
22 organization composed of Certified Public Accountants, many of whom practice their
23 profession as partners in professional partnerships. The partnerships themselves do not
24 belong to AICPA. AICPA PAC is AICPA’s separate segregated fund (“SSF”), and is
25 registered with the Commission.

26 Some partnerships deduct partners’ dues to AICPA from their partnership
27 compensation and aggregate all of the dues payments into a single check transmitted to

AICPA. AICPA PAC would like to accept contributions from partners in a similar manner. Under the proposal, partners would have their partnerships deduct their individual contributions from their respective compensation. A partnership would then aggregate these individual contributions into one check drawn on the partnership's operating account, which the partnership would then send to AICPA PAC.

Question Presented

May AICPA PAC accept a check representing contributions by individual partners of a partnership and attribute the contributions to the individual partners only and not also attribute the contribution to the partnership, and report the contributions as such?

Legal Analysis and Conclusions

The Commission concludes that AICPA PAC may accept a check from a partnership representing contributions by individual partners and that it may attribute the contributions to the individual partners only, as long as the check is comprised only of the personal funds of partners. AICPA PAC should report the contributions accordingly.

Under the Act and Commission regulations, a partnership is a "person." 2 U.S.C. 431(11); 11 CFR 100.10. As a result, a contribution from a partnership is attributable not only to individual partners but also to the partnership itself, *see* 11 CFR 110.1(e). However, not all actions undertaken by a partnership to facilitate contributions from partners result in a partnership contribution.

For example, in Advisory Opinion 2005-20 (Pillsbury Winthrop), a partnership that was a Federal contractor sought to use its automated electronic payroll system to disburse funds from the partnership's payroll account to the partnership-sponsored

1 nonconnected political committee. The payroll account held undistributed income of the
2 partners transferred to it from the partnership's operating account. All funds in the
3 payroll account were designated for partnership compensation. Each partner determined
4 to whom the payroll account disbursed the partner's compensation. The Commission
5 determined that at the moment the funds were disbursed from the payroll account, they
6 were the personal assets of the individual partners. Thus, when these funds were
7 disbursed from the payroll account to the partnership-sponsored nonconnected political
8 committee, the funds were not contributions by the partnership to the political committee.

9 To the extent partnerships forward contributions comprised solely of the personal
10 funds of partners to AICPA PAC, those funds would not be partnership contributions,
11 and would not have to be attributed to the partnerships or reported as such. The
12 partnerships' use of an account similar in all material respects to Pillsbury Winthrop's
13 payroll account would be one method of doing this. In order to attribute the contributions
14 properly, AICPA PAC would need to confirm that the funds it has received represent
15 only personal funds of individual partners that were disbursed to AICPA PAC at the
16 direction of the individual partners. AICPA PAC would also need to know which
17 partners contributed and the amount of each partner's contribution.

18 Your request raises the issue of partnership contributions resulting from the costs
19 associated with the forwarding of funds. In Advisory Opinion 2005-20 (Pillsbury
20 Winthrop), the costs incurred in using of the partnership's automated electronic payroll
21 system would have resulted in a contribution. Because that partnership was a Federal
22 contractor, such a contribution would have been prohibited by 2 U.S.C. 441c.
23 Accordingly, the Commission required the political committee to pay the partnership in

1 advance for these costs to avoid the making and accepting of an illegal contribution.
2 Similarly, if any of the partnerships forwarding contributions to AICPA PAC are
3 prohibited from making contributions, AICPA PAC must pay these partnerships in
4 advance for their costs associated with forwarding contributions to AICPA PAC. Where
5 a partnership may lawfully make contributions, AICPA PAC may accept the
6 contributions or reimburse the partnership for its costs within a commercially reasonable
7 time.¹

8 Accordingly, under the Act and Commission regulations, when AICPA PAC
9 receives checks from partnerships that are composed only of the partners' personal funds,
10 it may attribute the contributions to individual partners only and not to the partnerships.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then the requestor may not rely on that
16 conclusion as support for its proposed activity.

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18 Sincerely,
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21
22 Michael E. Toner
23 Chairman
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26 Enclosures (Advisory Opinion 2005-20)

¹ As the partnerships themselves are not members of AICPA, AICPA PAC may not solicit them for contributions. Nevertheless, AICPA PAC may accept any contribution it receives from a partnership that is permitted by law to make contributions. *See* 11 CFR 114.5(j).